Public Prosecutor v Kit Chee Wan

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41-31 OF 1997
SURIYADI J
12 OCTOBER 1998

Evidence *— Expert evidence — Gaming — Appointment of expert — Appointment made by Deputy Minister of Home Affairs instead of Minister of Finance as provided in Act — Whether expert was properly appointed — Common Gaming House Act 1953 ss 2, 11(1) & (6)*

Evidence *— Expert evidence — Gaming — Whether expert must prove background and capability — Common Gaming House Act 1953 s 11*

The respondent was charged under the Common Gaming Houses Act 1953 ('the Act') for assisting in carrying out a public lottery. The prosecutor called five witnesses including a common gaming expert ('SP4'). SP4 gave expert evidence and there was overwhelming evidence of the respondent being in possession of the items alleged to be related to public lottery. However, the respondent was acquitted on the ground that there was some flaw in the appointment of SP4 as an expert. The appointment of SP4 was gazetted pursuant to s 11 of the Act by the Deputy Minister of Home Affairs. The prosecution appealed.

Held, dismissing the appeal:

Even though s 11 is silent as to the requirement that an expert must establish his status as an expert for prosecution purposes, it is quite established that case laws do require an expert to prove his background and capability. In the present case, even though SP4 had orally testified that he was an expert, that he had adduced evidence before as one, that his evidence had been accepted in courts, and in the current case had described the various exhibits, that still did not meet the statutory requirement. By the very nature of the offence, and the provisions which have provided presumptions to assist the prosecution, it is therefore necessary that the provisions of the Act be strictly complied with (see pp 20H–I and 21A).

The usage of the word 'may' in s 11 merely meant that an expert may be appointed, but that appointment must be done by the Minister of Finance and announced in the Gazette. The two preconditions must be fulfilled. The gazetting in the present case was therefore invalid. Since there was no other evidence available for the court's consideration, the court was not convinced that SP4 had been properly appointed. Therefore, it could not be said that the prosecution had proved beyond reasonable doubt that the exhibits were gaming documents. Without successfully proving that they were related to public lottery, the presumption under s 11(1) of the Act could not be alluded to and utilized by the prosecution (see pp 21G–H, 22A–B, I and 23A).

A [**Bahasa Malaysia summary**

Penentang dipertuduhkan di bawah Akta Rumah Judi Terbuka 1953 ('Akta tersebut') kerana membantu menjalankan loteri awam. Pendakwa telah memanggil lima saksi termasuk seorang pakar judi terbuka ('SP4'). SP4 telah memberi keterangan pakar dan terdapat keterangan yang ketara penentang memiliki benda yang dikatakan berkaitan dengan loteri awam. Namun demikian, penentang telah dibebaskan atas alasan bahawa perlantikan SP4 sebagai seorang pakar adalah tidak sempurna. Perlantikan SP4 diwartakan menurut s 11 Akta tersebut oleh Timbalan Menteri Hal Ehwal Dalam Negeri. Pihak pendakwa merayu.

Diputuskan, menolak rayuan:

Walaupun s 11 tidak menyebut keperluan bahawa seseorang pakar mesti membuktikan tarafnya sebagai seorang pakar untuk tujuan pendakwaan, adalah mantap bahawa undang-undang kes memang menghendaki seorang pakar untuk membuktikan latar belakang dan keupayaan. Dalam kes ini, walaupun SP4 telah memberi keterangan secara lisan bahawa ia adalah seorang pakar, bahawa ia pernah mengemukakan keterangan sebagai seorang pakar, bahawa keterangannya telah diterima oleh mahkamah, dan dalam kes ini telah menjelaskan pelbagai ekshibit, ini masih tidak memenuhi keperluan statutori. Melalui sifat kesalahan itu sendiri, dan peruntukan yang telah memperuntukkan anggapan bagi membantu pendakwaan, maka adalah perlu bahawa peruntukan Akta tersebut dipatuhi secara ketat (lihat ms 20H–I dan 21A).

Penggunaan perkataan 'boleh' dalam s 11 cuma bermakna bahawa seorang pakar boleh dilantik, tetapi perlantikan itu mestilah dibuat oleh Menteri Kewangan dan diumumkan dalam Warta. Dua prasyarat ini mesti dipenuhi. Maka pewartaan dalam kes ini adalah tidak sah. Oleh kerana tiada keterangan lain untuk pertimbangan mahkamah, mahkamah tidak yakin bahawa SP4 telah dilantik dengan wajarnya. Oleh itu, ia tidak boleh dikatakan pihak pendakwa telah membuktikan melampaui keraguan munasabah bahawa ekshibit-ekshibit tersebut adalah dokumen perjudian. Tanpa berjaya membuktikan bahawa mereka adalah berkaitan dengan loteri awam, anggapan di bawah s 11(1) Akta tersebut tidak boleh dirujuk dan digunakan oleh pihak pendakwa (lihat ms 21G–H, 22A–B, I dan 23A).]

Notes

For cases on expert evidence in gaming, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 924–929.

Cases referred to

Cheng Ah Sang v PP [1948] MLJ 82 (refd)

Lye Kooi Yoon & Anor v Timbalan Pendakwa Raya Criminal Appeal No 41–102–1996 High Court, Pulau Pinang (refd)
Mat v PP [1963] MLJ 263 (refd)
Ong Yap Chang v PP [1962] MLJ 46 (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19 (refd)
Teoh Ng Choon & Ors v PP; and Chai Ah Gioh v PP [1955] MLJ 58 (refd)
Wong Chop Saow v PP [1965] MLJ 247 (refd)

Legislation referred to

Common Gaming Houses Act 1953 ss 2, 11(1), (3), (4), (5), (6)
Criminal Procedure Code (FMS Cap 6) s 399
Evidence Act 1950 ss 56, 57
Lotteries Act 1952 ss 3, 4, 14

Maziah bte Abu (State Legal Adviser's Office) for the prosecution.
Peter Foo Nyong Tiam (*Foo Nyong Tiam & Associates*) for the respondent.

Suriyadi J: The respondent was charged under s 4A(a) of the Common Gaming Houses Act 1953 (Act 289) for assisting in carrying out a public lottery. If found guilty, he would be liable to a fine of not less than RM20,000 and not more than RM200,000 and shall also be imprisoned for not more than five years. It was indisputable that the respondent was facing a charge which entailed severe punishments. The prosecutor called five witnesses, including a common gaming expert, ie one Chief Inspector Tan Kok Hian (SP4). The evidence adduced by the prosecution attested to a scenario where the respondent when arrested personally took out certain items from his pockets, namely:

(i) P1 — a small book;
(ii) P2 — blue carbon paper;
(iii) P3 — a small book bearing Nos 555;
(iv) P4 — a purse;
(v) P5 — some money totalling RM331; and
(vi) P6 — 2 ball pens.

Inspite of SP4's expert evidence, and inspite of the overwhelming evidence of the respondent being in possession of the above items, the latter was still acquitted. The prosecution filed an appeal and I heard it. At the end of the hearing, I dismissed the appeal.

Evidence was adduced to confirm that SP4 was a gaming expert gazetted vide Warta Kerajaan PU (B) 625, on 26 November 1987. He testified that he had undergone three gaming courses and was familiar with the giving of evidence in open court. The learned magistrate had no qualms about accepting parts of his evidence except on the issue of his expert evidence, due to some flaw in his appointment. Having scrutinised the evidence and the law, I was fully satisfied that the learned magistrate was

A right in arriving at that conclusion, and hence supporting the acquittal of the respondent. Sifting through the notes of proceeding, it transpired that SP4 was gazetted pursuant to the Common Gaming Houses Act 1953 (Act 289) by Dato' Megat Junid bin Megat Ayob, the Deputy Minister of Home Affairs. The production of PU (B) 625 confirmed that the gazetting was pursuant to s 11 of the said Common Gaming Houses Act 1953.

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Under s 11(6) of the above Act, to qualify as an expert, a person will have to be gazetted by the Minister. Under s 2 of this same Act, 'Minister' means a Minister who is charged with the responsibility of the regulation of lotteries. The next step sees this discourse taking a sojourn into the realm of the Lotteries Act 1952 (Act 288). Section 14 of this Lotteries Act empowers
C the Minister of Finance to make the relevant regulations regarding lotteries; and prescribing any matter which may be necessary to enforce the purpose of the Lotteries Act 1952. Section 3 of the latter, in crystal clear terms also provide that any lottery promoted or conducted without a permit by the Minister of Finance shall be unlawful. For purposes of easy reference, I reproduce ss 3 and 4:

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> 3 Subject to s 16, any lottery promoted or conducted without a permit granted by the Minister of Finance under this Act or otherwise than in accordance with this Act shall be unlawful.
>
> 4(1) The Minister of Finance may, in his discretion, grant a permit to any person or society for the promotion of a lottery, whether public or private,
> E for the purpose of raising funds to be applied in aid of any philanthropic, religious, educational or welfare organisation, institution, body or service, or in carrying out any philanthropic, religious, educational or welfare scheme or project, or any specific work beneficial to the community or any part thereof or for the improvement of the social condition or for the advancement of the welfare of the community or any part thereof in some
> F specified way or ways or for any other purpose of a charitable nature:
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> Provided that no funds so raised shall be applied for any purpose connected with the religion of Islam:
>
> Provided further that where a private lottery is to be promoted by a society whose objects are predominantly of a social or sporting character,
> G the purpose for which the funds are to be raised may include the furtherance of the objects of such society.
>
> (2) Such permit may be granted either in respect of a particular lottery or in respect of a series or number of lotteries to be promoted within such period of time as the Minister of Finance may specify in the permit. ...

H The inescapable conclusion derived from the above provisions is that it is the Minster of Finance who grants the permit for the promotion or conduct of any lottery, and, pursuant to other provisions, is also responsible for the promulgation of the regulations. Therefore, reverting to s 11(6) of the Common Gaming Houses Act 1953 (Act 289), read together with s 2, the relevant Minister to gazette a common gaming expert must be the Minister
I of Finance and nobody else. Certainly not the Deputy Minister of Home Affairs.

Some diligence was portrayed by the learned deputy public prosecutor, when she cited the unreported case of *Lye Kooi Yoon & Satu Lagi v Timbalan Pendakwa Raya*, Mahkamah Tinggi Pulau Pinang, Rayuan Jenayah No 41–102–1996 to support her appeal. In that case, the same issue was canvassed in open court, as the expert was similarly gazetted by the Deputy Minister of Home Affairs, and not by the Minister of Finance. His Lordship there advanced a highly significant question as to whether an improperly gazetted expert could statutorily be denied of that expert status. His Lordship opined:

> Pada pandangan saya, seorang itu menjadi pakar dalam sesuatu ilmu bukan kerana warta, tetapi kerana kelayakannya dan pengalamannya dalam sesuatu bidang itu. Kelayakan akademik sahaja pun tidak menjadikan seseorang itu seorang pakar. Sebaliknya, ketiadaan kelayakan akademik juga tidak menghalang seseorang itu daripada menjadi seorang pakar dalam sesuatu bidang. Kepakarannya boleh diperolehi melalui pengalaman.
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> Mengenai saksi pakar loteri, saya tidak dapat menemui mana-mana peruntukan atau penghakiman yang mengatakan bahawa cuma seorang yang diwartakan di bawah s 11(6) Akta Rumah Judi Terbuka 1953 sahaja yang layak memberi keterangan itu.

Further down, His Lordship commented that:

> Pada pandangan saya, tidak kira sama ada seseorang itu diwartakan atau tidak, dia dikehendaki memuaskan mahkamah tentang kepakarannya dan caranya disebut dalam petikan di atas. ...
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> Pada pandangan saya, sudah memadai untuk beliau diterima sebagai seorang pakar judi. Perkara (subject matter) yang menjadi persoalan kepakaran ialah mengenai judi ekor, bukan mengenai jenis dadah berbahaya misalnya, yang memerlukan analisa makmal. Setiap penikam judi ekor pun kenal 'tiket ekor'.

Having considered the views of Abdul Hamid J, as much as I agree that expertise is not obtained through administratively correct gazetting, in the context of the Common Gaming Houses Act 1953, the requirements must be stringently adhered to. Laville J in *Cheng Ah Sang v PP* [1948] MLJ 82 had occasion to say:

> I would call the attention of the police authorities to the fact that gaming is a highly technical and artificial offence and that to ensure a conviction, it is necessary that the provisions of the Enactment be rigidly and meticulously followed out, in order that the presumptions laid down for the help of the police in prosecuting offenders may arise.

Even though s 11 is silent as to the requirement that an expert must establish his status as an expert for prosecution purposes, apart from the built-in administrative requirement under s 11(6), it is quite established that case laws do require an expert to prove his background and capability. Even though SP4 had orally testified that he was an expert, that he had adduced evidence before as one, that his evidence had been accepted in courts, and in the current case had described the various exhibits, particularly the gaming characteristics, that still did not meet the statutory requirement. By the very nature of the offence, and the provisions which

A have provided presumptions to assist the prosecution, it is therefore necessary that the provisions of the Common Gaming Houses Act 1953 be strictly complied with. This is to ensure that fair play and a balance treatment is accorded to an accused person, vis-a-vis the prosecution who is assisted by 'presumption provisions'.

B Perusing s 11, in particular sub-ss (3), (4) and (5), the prosecution could attempt to prove its case by means of oral testimony of the expert or by a certificate supplied by him. In the event the prosecution adverts to certificates as evidence of proof of gaming, certain pre-conditions must still be complied with. As it is my stance that an error in the gazetting of an expert for cases under the Common Gaming Act 1953 neutralizes his C evidence in relation to his expertise, it is therefore pertinent that I discuss s 11 in some depth. The course of action of tendering a certificate, affirmed by an expert, will permit the dispensation of the maker during the trial in the event he is not required to attend the hearing. This mode is analogous to documents, eg medical certificate, chemist report, etc being tendered during trials pursuant to s 399 of the Criminal Procedure Code, without the D makers being required to attend as witnesses. If one were to browse through s 399 of the Criminal Procedure Code, and s 11 of the Common Gaming Houses Act 1953, nowhere do they provide that the makers are required to prepare affidavits to confirm and establish their credentials. Indisputely, to establish their credentials and having to suffer the least form of hassle, the best way is by endorsing the certificates with their names and rank if any. E Thereafter, if the experts have been gazetted, the prosecution may safely seek recourse in ss 56 and 57 of the Evidence Act 1950 whereat courts shall take judicial notice of their expert standing. The snag will only arise if the gazetting of a person was not done by the correct Minister, ie the Minister of Finance in this case, and in which situation that flaw will render the F contents inadmissible.

Section 11 of the Common Gaming Houses Act 1953, and all its subsections, surely must have a special role to play in the statute, in the country's continuous war to eradicate such highly technical offences abhorred by Parliament. It must be due to the desire of this institution to put into effect that intention that these provisions were promulgated, inter G alia, necessitating the appointment of experts. The fact that SP4 was gazetted by the Deputy Minister of Home Affairs, albeit wrongly, must be a tacit admission of the necessity of having gaming experts to be gazetted. To wind up on this point, as the gazetting was invalid, and with no other evidence available for my consideration, I was therefore not convinced that SP4 had been properly appointed. Thus a serious chink existed in the H prosecution's chain of evidence. No matter what the charge is against an accused person, it has always been the principle that it is the duty of the prosecution to prove the prisoner's guilt beyond reasonable doubt (*Mat v PP* [1963] MLJ 263).

The learned deputy public prosecutor did attempt to persuade me that I it was not wrong for the Deputy Minister of Home Affairs to gazette SP4 as an expert. She ventilated that the purposeful usage of 'may', in s 11(6) of the Common Gaming Houses Act 1953, gave that power to Dato' Megat

Junid bin Megat Ayob to do so. I found this argument to be unacceptable and devoid of logic, as the usage of the word 'may' in the context of that provision, merely meant that an expert may be appointed, but that appointment must be done by the Minister of Finance and announced in the Gazette. The two pre-conditions must be fulfilled. To acquiesce to her argument that a different Minister may take over the duties of the Minister of Finance, would tantamount to even permitting the Minister of Waterworks to gazette SP4 as a gaming expert. Surely that is not the sacred intention of Parliament.

Without the expert and admissible evidence of SP4 regarding the gaming related documents, the learned magistrate would be in a rather difficult position to decide either way. Abdul Hamid FJ (as he then was) in *Syed Abu Bakar bin Ahmad v PP* [1984] 2 MLJ 19 at p 23 had occasion to say:

> It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so as to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence.

Apart from a magistrate having to adjudicate whether to accept or reject the evidence of the expert, he is also required to make a finding of fact based on the available evidence (*Wong Chop Saow v PP* [1965] MLJ 247). Be it a summons or an arrest case, any respondent (accused) is entitled to the full weight of the law of evidence, and no diminution of that standard should be entertained by a court of law. If there be any doubts present in the prosecution's case, especially something so substantive as in this case, where the very foundation of the prosecution's case could not do away with expert evidence, then the benefit of that doubt must be conferred on the respondent (accused).

Evidentially, without SP4's evidence, the prosecution would merely have tendered pieces of papers having unintelligible words scribbled on them, to be deciphered by a young and flabbergasted magistrate (*Ong Yap Chang v PP* [1962] MLJ 46). Bearing in mind the technicalities involved, and where expert evidence is not a mere formality, or where that presiding magistrate could not be said to know much more than the expert, he would definitely have found himself in a rather embarrassing position. As that relevant evidence pertaining SP4's expertise was flawed, his views regarding the documents therefore could only be equated with a mere opinion held by any layman. It is trite that the law of evidence imposes a different set of rules for such opinion vis-a-vis that of an expert. Without that assistance from the expert, the learned magistrate will be grappling alone in the dark to resolve undeciphered and mysterious looking documents (*Teoh Ng Choon & Ors v PP* and *Chai Ah Gioh v PP* [1955] MLJ 58). On that score, it could not be said that the prosecution had proved beyond reasonable doubt that the exhibits were gaming documents. Without successfully proving that they were related to public lottery, the presumption under s 11(1) of the Common Gaming Houses Act 1953 could therefore not be alluded to and

A utilized by the prosecution. The contagion effect invariably was that the prosecution did fail to prove that the respondent assisted in carrying on a public lottery, hence the dismissal of the appeal.

Appeal dismissed.

B Reported by Jafisah Jaafar

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